

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

---

FAIR ISAAC CORPORATION,

Court File No. 16-cv-1054 (DTS)

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,  
an Indiana corporation, and ACE  
AMERICAN INSURANCE COMPANY,  
a Pennsylvania corporation,

**DEFENDANTS' SUPPLEMENTAL  
JURY INSTRUCTIONS**

Defendants.

---

Defendants Federal Insurance Company and ACE American Insurance Company submit the following additional proposed jury instructions as a supplement to the Joint Proposed Jury Instructions dated January 25, 2023, Dkt. 1006, and pursuant to the Court's guidance at the Final Pretrial Conference. Defendants have exchanged with Fair Isaac Corporation ("FICO") these proposed instructions and objections.

Defendants' proposed Instruction No. 25(g) – Waiver

Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned either through affirmative conduct or by failure to act.

[*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653, 658 (N.Y. 2006); *General Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 647 N.E.2d 1329, 1331 (N.Y. 1995).] Parties may still waive a contractual right even if the contract contains a no-waiver clause. New York law allows the parties to waive a no-waiver provision by a subsequent course of conduct. [*Travellers Intern. AG, et al. v. Trans World Airlines, Inc.*, 722 F. Supp. 1087, 1098 (S.D.N.Y. 1989).] To determine whether such a waiver occurred, the question is whether there is enough evidence that the reasonable expectations of both parties under the original agreement were supplanted by subsequent actions. [*Simon & Son Upholstery, Inc. v. 601 West Assocs., LLC*, 268 A.D.2d 359, 360 (1st Dep’t 2000).]

Defendants' proposed Instruction No. 25(h) – Estoppel

A plaintiff may not claim that a defendant breached a contractual provision when the defendant acted as it did because it justifiably relied on the plaintiff's words or conduct indicating that the defendant's actions were not a breach. [*Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001).]

Defendants' position on proposed Instruction Nos. 25(g) and 25(h)

Defendants' position is that these instructions accurately describe the doctrines of waiver and estoppel. Defendants rely on the legal authority cited in their proposals.

FICO has objected to these instructions on the ground that Defendants' waiver and estoppel defenses are no longer in the case. That is incorrect. Defendants pled the defenses of waiver and estoppel in their Answer and Counterclaims to FICO's Second Amended Complaint. Dkt. 137 at 18. FICO did not move for, much less obtain, summary judgment on Defendants' waiver and estoppel defenses. Indeed, the Court declined to address these defenses in its summary judgment order. Dkt. 731 at 41 n.33.

Defendants' proposed Instruction relating to FICO's territory claim

You will see references in the documents to a claim by FICO that the License Agreement at issue in this case was limited to the territory of the United States. The Court has previously decided that “the [Blaze Advisor] License Agreement unambiguously lacks a geographic restriction on the installation or physical location of Blaze Advisor.” **[Dkt. 731 at 41.]** Accordingly, this “territory claim” was not a valid legal basis upon which FICO could terminate the license agreement.

Defendants' position on the proposed Instruction relating to FICO's territory claim

Defendants' position is that this instruction accurately and succinctly describes the dismissal of FICO's territory claim.

Dated: February 9, 2023

*/s Leah Godesky*

---

Terrence J. Fleming (#0128983)

tfleming@fredlaw.com

Leah C. Janus (#0337365)

ljanus@fredlaw.com

Christopher D. Pham (#0390165)

cpham@fredlaw.com

Ryan C. Young (#0397751)

ryoung@fredlaw.com

Panhia Vang (#399444)

pvang@fredlaw.com

**Fredrikson & Byron, P.A.**

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402-1425

(612) 492-7000 (tel.)

(612) 492-7077 (fax)

Leah Godesky (Admitted Pro Hac Vice)

lgodesky@omm.com

Anton Metlitsky (Admitted Pro Hac Vice)

ametlitsky@omm.com

Daryn Rush (Admitted Pro Hac Vice)

drush@omm.com

Roxana Guidero (Admitted Pro Hac Vice)

rguidero@omm.com

**O'Melveny & Myers LLP**

Times Square Tower

7 Times Square

New York, NY 10036

(212) 326-2000

*Attorneys for Federal Insurance Company  
and ACE American Insurance Company*